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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

NORTHERN PLAINS RESOURCE  
COUNCIL, *et al.*,

Plaintiffs,

v.

THOMAS A. SHANNON, JR., in his  
official capacity as Under Secretary for  
Political Affairs, *et al.*,

Federal Defendants,

CASE NO. 4:17-CV-00031-BMM

**DEFENDANTS' STATEMENT  
REGARDING CONSOLIDATION**

and	
TRANSCANADA CORPORATION, <i>et</i>	
<i>al.</i> ,	
Intervenor-Defendants.	

Defendants U.S. Department of State *et al.* hereby submit this statement regarding consolidation of *Indigenous Environmental Network v. U.S. Department of State*, No. 4:17-cv-00029-BMM with *Northern Plains Resource Council v. Shannon*, No. 4:17-cv-00031-BMM. As both cases challenge approvals for the Keystone XL Pipeline, Defendants believe that consolidation of the two cases is appropriate and would streamline the presentation of issues before the Court.

Consolidation is appropriate when the cases involve common factual and legal issues. *See* Fed. R. Civ. P. 42(a). The governing rule states:

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay.

*Id.* A court has broad discretion to consolidate cases involving similar facts and legal claims. *Thomas Inv. Partners, Ltd. v. United States*, 444 Fed. Appx. 190, 193 (9th Cir. 2011).

Consolidation is appropriate here because both cases challenge the Under Secretary of State's issuance of a presidential permit for the Keystone XL Pipeline, as well as the U.S. Fish and Wildlife Service's biological opinion relating to the pipeline. *See* First Am. Compl. for Decl. and Inj. Relief ¶¶ 1-5, *Indigenous*

*Environmental Network*, No. 4:17-cv-00029-BMM (ECF No. 61); Third Am. Comp. for Decl. and Inj. Relief ¶¶ 1-15, *Northern Plains Resource Council*, No. 4:17-cv-00031-BMM (ECF No. 58). Further, both cases involve similar claims alleging violations of the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”). See First Am. Compl. for Decl. and Inj. Relief ¶¶ 31-80, 82-84, 86-111, *Indigenous Environmental Network*, No. 4:17-cv-00029-BMM; Third Am. Comp. for Decl. and Inj. Relief ¶¶ 147-52, 160-63, 165-72, 174-78, *Northern Plains Resource Council*, No. 4:17-cv-00031-BMM.<sup>1</sup> Accordingly, the criteria for consolidation clearly are met.

Further, should the cases survive the pending motions to dismiss, consolidation of the cases would promote judicial efficiency. Through consolidation, the parties would submit a case management plan, the administrative record, and other preliminary filings just once in the consolidated case, rather than filing them in both cases. And given that both sets of plaintiffs challenge the same actions and raise the same legal claims, there is likely to be

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<sup>1</sup> The *Northern Plains Resource Council* case also contains a NEPA claim against the U.S. Bureau of Land Management (“BLM”). See Third Am. Comp. for Decl. and Inj. Relief ¶¶ 154-58, No. 4:17-cv-00031-BMM. However, BLM has not yet made a decision regarding a right-of-way for the Keystone XL Pipeline, and when it does, the plaintiffs in *Indigenous Environmental Network* may choose to amend their complaint to challenge BLM’s decision as well.

substantial overlap in the arguments that are raised in the merits briefing in both cases. This counsels in favor of consolidation, such that both cases could proceed on the same, or similar, schedule in a coordinated manner.

Defendants are mindful that all parties will want an adequate opportunity and sufficient briefing space to argue their own claims and defenses, but believe that any such concerns can be addressed through case management.

Respectfully submitted this 18th day of September, 2017.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2)(E), the attached statement is proportionately spaced, has a typeface of 14 points, and contains 517 words, excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and exhibit index.

**CERTIFICATE OF SERVICE**

I hereby certify that on September 18, 2017, a copy of the foregoing Reply in Support of Motion to Dismiss on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek  
LUTHER L. HAJEK  
U.S. Department of Justice